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Telekom Malaysia Bhd v KLK Electronic Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)-1019–05 OF 2017
NALLINI PATHMANATHAN, BADARIAH SAHAMID AND ZABARIAH MOHD JJCA
14 MAY 2019

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Contract — Mistake — Whether there was mistake in law — Defendant paid part of plaintiff's invoices by mistakenly crediting monies into plaintiff's accounts instead of paying into agreed designated account — Whether trial judge wrongly construed this to be mistake in law — Whether payment by mistake meant D *payment made under mistaken belief that it was due when in fact it was not due — Whether trial judge departed from plaintiff's pleaded case for recovery of monies unpaid on invoices by misconstruing it to be claim for monies paid under mistake — Whether trial judge erred in disallowing defendant from tendering computer-generated documents to prove it had settled all invoices of plaintiff* E *— Whether trial court's insistence on certificate under s 90A of the Evidence Act 1950 to be tendered before documents could be admitted was wrong as person in charge of the computer was present in court to testify — Whether certificate under s 90A was not the only way in which electronically-general documents could be admitted in evidence — Whether trial judge erred in finding plaintiff had proven* F *its case and that defendant had not proven its defence — Contracts Act 1950 s 73*

The respondent ('KLK') was engaged by the appellant ('TMB') to provide certain engineering services. One of KLK's contracts with TMB was financed by Affin Bank Bhd ('Affin'). Pursuant to a factoring agreement and deed of G assignment, KLK assigned all its rights to the proceeds of its contract with TMB to Affin. KLK informed TMB of the assignment and instructed TMB to credit all payments due to it into a designated account at Affin ('the designated account'). Later, on being informed by Affin that it had not received payments in the designated account, KLK sued TMB in the High Court for the unpaid H amounts. In its defence, TMB said a number of invoices issued by KLK were not endorsed with any specific instruction that payment was to be made into the designated account. In such cases, TMB made payments into other accounts held by KLK. TMB said it had paid all invoices issued by KLK amounting to RM6,749,864.52. At the trial, TMB sought to admit I computer-generated documentary evidence ('the C3 documents') to support that assertion but was prevented from doing so by the trial judge who ruled that without the production of a certificate under s 90A of the Evidence Act 1950, the documents were inadmissible. This was despite TMB informing the court that the person who was in charge of the computer, DW3, was present in court

to testify. The trial court allowed KLK's claim in the sum of RM5,533,072.25 after holding that, inter alia: (a) KLK's claim was not for recovery of monies unpaid on its invoices but for monies TMB had mistakenly paid into non-designated accounts; and (b) KLK had proven its claim but TMB had not proven its defence . In the instant appeal, TMB argued that the trial judge erred in, inter alia: (i) holding that KLK had proven its claim on balance of probabilities; (ii) wrongly imposing on TMB the burden of proving its defence; (iii) failing to appreciate that a number of KLK's invoices did not bear the instruction to credit payment into the designated account; (iv) failing to take into account a clause in a letter dated 6 August 2007 from KLK to TMB stating that if TMB mistakenly made payments into other accounts belonging to KLK, rather than into the designated account, KLK would not hold TMB responsible but would resolve the matter with the respective bank concerned; (v) refusing to allow the C3 documents to be admitted in evidence; (vi) failing to appreciate that KLK would be unjustly enriched if its claim was allowed as payment on the invoices had already been made; and (vi) departing from KLK's pleaded case and holding that the claim was actually for recovery of monies paid under a mistake.

Held, allowing the appeal and setting aside the High Court's decision:

(1) The trial judge misdirected himself in respect of the legal and evidential burden of proof. Even though KLK had not discharged the evidential burden of establishing a prima facie case that payments from TMB were outstanding, the trial judge nevertheless shifted the evidential burden to TMB to prove its defence that although the payments were not credited into the designated account, they were credited into other accounts belonging to KLK (see para 36).

(2) The trial judge took a very narrow approach to s 90A of the Evidence Act 1950 by ruling that the C3 documents were only admissible if a certificate under that section was produced, even though the person with the authority to issue the certificate ('DW3') was present in court to testify. A certificate under s 90A was not the only way in which electronically-generated documents could be introduced as evidence. The notes of proceedings showed that TMB's counsel had commenced questions for DW3 to verify that he had control over the computer system in order to fulfil the requirements of s 90A but he was stopped by the trial judge who insisted on the production of a certificate nevertheless. The C3 documents were material to show that TMB had paid all of KLK's invoices. To allow KLK's claim for payment on the same invoices a second time was to unjustly enrich KLK. The trial judge committed a grave error of law in ruling that the C3 documents were inadmissible, which ruling contributed in a substantial degree to his erroneous finding that KLK had proven its claim (see paras 39–41 & 53).

(3) The trial judge erred in finding that TMB was entirely to be blamed for crediting payment on the invoices into non-designated accounts. Clause 6 of a letter dated 6 August 2007 from KLK to TMB stated that KLK would not hold TMB responsible if payments had mistakenly been made to KLK and that in such event KLK would take steps to regularise its accounts with the bank concerned. KLK's witness, PW1, in cross-examination agreed that cl 6 meant what it said. PW1 had also said that there was a lack of conclusive evidence that all the invoices issued by KLK contained specific instructions for payment into the designated account. The trial judge failed to consider this evidence by PW1 and had made findings of fact that were inconsistent with the evidence adduced. Based on the evidence adduced, KLK had failed to prove its claim on balance of probabilities (see paras 42–48).

(4) The trial judge plainly erred in finding that the mistake in crediting payments into a non-designated account was a mistake in law. Based on s 73 of the Contracts Act 1950 and case law on the point, the recovery of monies paid under a mistake must refer to a payment which was not due and which could not have been enforced. In the instant case, however, payment on the invoices was due and the mistake was in crediting the amount to other than the agreed designated account. The trial judge plainly erred in departing from KLK's pleaded case and holding that its case was not for recovery of amounts due under the invoices but for recovery of monies that had been paid under mistake (see paras 49–52).

[Bahasa Malaysia summary

Responden ('KLK') telah dilantik oleh perayu ('TMB') untuk menyediakan perkhidmatan kejuruteraan tertentu. Salah satu kontrak KLK dengan TMB dibiayai oleh Affin Bank Bhd ('Affin'). Berdasarkan kepada perjanjian pemfaktoran dan Surat ikatan penyerahakkan, KLK telah memberikan semua haknya kepada hasil kontraknya dengan TMB kepada Affin. KLK memaklumkan TMB mengenai tugasan tersebut dan mengarahkan TMB untuk mengkreditkan semua bayaran yang terhutang ke dalam akaun yang ditetapkan di Affin ('akaun yang ditetapkan'). Kemudian, apabila dimaklumkan oleh Affin bahawa ia tidak menerima bayaran dalam akaun yang ditetapkan, KLK menyaman TMB di Mahkamah Tinggi untuk jumlah yang tidak dibayar. Dalam pembelaannya, TMB berkata sejumlah invois yang dikeluarkan oleh KLK tidak diendorskan dengan apa-apa arahan spesifik bahawa pembayaran tersebut akan dimasukkan ke dalam akaun yang ditetapkan. Dalam kes sedemikian, TMB membuat pembayaran ke akaun lain yang dipegang oleh KLK. TMB berkata ia telah membayar semua invois yang dikeluarkan oleh KLK berjumlah RM6,749,864.52. Pada perbicaraan tersebut, TMB memohon untuk memasukkan keterangan dokumentari yang dihasilkan oleh komputer ('dokumen C3') untuk menyokong dakwaan tersebut tetapi telah dihalang daripada berbuat demikian oleh hakim

perbicaraan yang memutuskan bahawa tanpa pengeluaran satu perakuan di bawah s 90A Akta Keterangan 1950, dokumen tersebut tidak boleh diterima. Ini walaupun TMB memberitahu mahkamah bahawa orang yang bertanggungjawab terhadap komputer, DW3, hadir di mahkamah untuk memberi keterangan. Mahkamah perbicaraan membenarkan tuntutan KLK dalam jumlah sebanyak RM5,533,072.25 selepas memutuskan bahawa, antara lain: (a) tuntutan KLK bukan untuk pemulihan wang yang tidak dibayar pada invoisnya tetapi untuk wang TMB telah tersilap dibayarkan ke akaun yang tidak ditetapkan; dan (b) KLK telah membuktikan tuntutannya tetapi TMB tidak membuktikan pembelaannya. Dalam rayuan ini, TMB berhujah bahawa hakim perbicaraan terkhilaf dalam, antara lain: (i) memutuskan bahawa KLK telah membuktikan tuntutannya atas imbangan kebarangkalian; (ii) dengan salah mengenakan TMB beban membuktikan pembelaannya; (iii) gagal untuk menghargai bahawa beberapa invois KLK tidak mempunyai arahan untuk pembayaran kredit ke dalam akaun yang ditetapkan; (iv) tidak mengambil kira klausa dalam surat bertarikh 6 Ogos 2007 daripada KLK kepada TMB yang menyatakan bahawa jika TMB tersilap membuat pembayaran ke akaun lain milik KLK, dan bukannya ke akaun yang ditetapkan, KLK tidak akan membuat TMB bertanggungjawab tetapi akan menyelesaikan perkara tersebut dengan bank berkenaan; (v) menolak untuk membenarkan dokumen C3 diterima sebagai bukti; (vi) gagal untuk menghargai bahawa KLK akan diperkaya secara tidak adil jika tuntutannya dibenarkan sebagai pembayaran pada invois telah dibuat; dan (vi) menyimpang dari kes yang diplid KLK dan memutuskan bahawa tuntutan tersebut sebenarnya untuk pemulihan wang yang dibayar di bawah kesilapan.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Hakim bicara tersalah arah dirinya berkenaan dengan beban bukti perundangan dan keterangan. Walaupun KLK tidak melepaskan beban keterangan untuk membuktikan kes prima facie bahawa pembayaran daripada TMB adalah tertunggak, hakim bicara bagaimanapun mengubah beban keterangan kepada TMB untuk membuktikan pembelaannya bahawa walaupun pembayaran tidak dikreditkan ke akaun yang ditetapkan, mereka dikreditkan ke akaun lain milik KLK (lihat perenggan 36).

(2) Hakim bicara mengambil pendekatan singkat terhadap s 90A Akta Keterangan 1950 dengan memutuskan bahawa dokumen C3 hanya boleh diterima jika suatu perakuan di bawah seksyen tersebut dihasilkan, walaupun orang yang mempunyai kuasa untuk mengeluarkan perakuan ('DW3') hadir di mahkamah untuk memberi keterangan. Perakuan di bawah s 90A bukanlah satu-satunya cara di mana dokumen yang dihasilkan secara elektronik boleh dilampirkan sebagai bukti. Nota-nota prosiding menunjukkan bahawa peguam TMB telah memulakan soalan

untuk DW3 untuk mengesahkan bahawa dia mempunyai kawalan ke atas sistem komputer untuk memenuhi keperluan s 90A tetapi dia dihentikan oleh hakim bicara yang menegaskan pengeluaran perakuan. Dokumen C3 adalah penting untuk menunjukkan bahawa TMB telah membayar semua invois KLK. Untuk membenarkan tuntutan KLK untuk pembayaran pada invois yang sama untuk kali kedua adalah untuk memperkayakan KLK secara tidak adil. Hakim bicara melakukan kesilapan besar undang-undang dalam memutuskan bahawa dokumen C3 tidak boleh diterima, yang keputusannya menyumbang kepada tahap yang ketara terhadap penemuannya yang salah bahawa KLK telah membuktikan tuntutannya (lihat perenggan 39–41 & 53).

(3) Hakim bicara terkhilaf dalam menemui bahawa TMB sepenuhnya dipersalahkan untuk mengkreditkan pembayaran pada invois ke dalam akaun yang tidak ditetapkan. Klausa 6 surat bertarikh 6 Ogos 2007 daripada KLK kepada TMB menyatakan bahawa KLK tidak akan memegang TMB yang bertanggungjawab jika pembayaran telah dibuat secara salah kepada KLK dan dalam keadaan sedemikian KLK akan mengambil langkah-langkah untuk melaraskan akaunnya dengan bank berkenaan. Saksi KLK, PW1, dalam pemeriksaan balas bersetuju bahawa klausa 6 bermaksud apa yang dikatakannya. PW1 juga mengatakan bahawa terdapat kekurangan bukti konklusif bahawa semua invois yang dikeluarkan oleh KLK mengandungi arahan khusus untuk pembayaran ke dalam akaun yang ditetapkan. Hakim bicara gagal mempertimbangkan keterangan ini oleh PW1 dan telah membuat penemuan fakta yang tidak konsisten dengan keterangan yang dikemukakan. Berdasarkan keterangan yang dikemukakan, KLK gagal membuktikan tuntutannya di atas imbangan kebarangkalian (lihat perenggan 42–48).

(4) Hakim bicara dengan jelas tertkhilaf apabila mendapati kesilapan dalam mengkreditkan pembayaran ke dalam akaun tidak ditetapkan adalah kesilapan dalam undang-undang. Berdasarkan s 73 Akta Kontrak 1950 dan undang-undang kes, pemulihan wang yang dibayar di bawah kesilapan mestilah merujuk kepada pembayaran yang tidak perlu dibayar dan yang tidak dapat dikuatkuasakan. Walau bagaimanapun, dalam kes ini, pembayaran pada invois adalah terhutang dan kesilapan adalah dalam mengkreditkan amaun tersebut selain daripada akaun yang ditetapkan. Hakim bicara secara jelas terkhilaf dalam menyimpang dari kes yang diplid KLK dan menyatakan bahawa kesnya bukan untuk pemulihan jumlah yang perlu dibayar di bawah invois tetapi untuk pemulihan wang yang telah dibayar atas dasar kesilapan (lihat perenggan 49–52).]

Notes

For cases on mistake in general, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 6523–6568.

Cases referred to

Ahmad Najib bin Aris v Public Prosecutor [2009] 2 MLJ 613, FC (refd)
Gerard Jude Timothy Pereira v Kasi a/l KL Palaniappan [2017] 6 MLJ 54, CA (refd)
Malayan Banking Bhd v Ching Suit Fee [2012] 2 MLJ 289, FC (refd)

Legislation referred to

Contracts Act 1950 s 73
Evidence Act 1950 ss 90A, 101

Appeal from: Civil Suit No 22NCVC-485–09 of 2015 (High Court, Kuala Lumpur)

Shahul Hameed Amirudin (Idza Hajar Ahmad Idzam, Bailey Leong Pui Yee and Lee Sheen Yee with him) (Zul Rafique & Partners) for the appellant.
Abd Shukor Tokachil (Muhammad Zulfaqar Zikry Wahidir with him) (Shukor & Assoc) for the respondent.

Badariah Sahamid JCA:

INTRODUCTION

[1] This is an appeal against the decision of the learned trial judge delivered on 15 May 2017, which allowed the plaintiff's claim against the defendant for the amount of RM3,586,000 as the sum due and owing to the plaintiff for payment invoices in respect of contracts for the supply, delivery and provision of engineering services by the plaintiff to the defendant.

[2] For ease of reference parties will be referred to as they were in proceedings before the High Court.

BACKGROUND FACTS

[3] Initially, the plaintiff had commenced a suit against two defendants, viz the first defendant, Telekom Malaysia Bhd and the second defendant, Standard Chartered Bank Bhd. Following a discovery application, the plaintiff amended its statement of claim, and withdrew the action against the second defendant. The plaintiff proceeded its claim against the first defendant, Telekom Malaysia Bhd only ('the defendant').

A **[4]** The following facts are not disputed. By a letter of award dated 2 February 2007, the defendant had awarded the plaintiff a contract for the supply, delivery and provision of engineering services for battery system for the defendant (contract No K1530949/07). The value of the said contract was for RM18,000. A formal written contract was executed on 19 July 2007. Vide a B supplementary agreement to contract No K1530949/07, the contract value was increased to RM25,808,984.83.

[5] The defendant had also awarded the plaintiff contract No K1260066/07 for a contract value of RM6,000. A formal written contract was also entered C into between the plaintiff and the defendant.

[6] For the purpose of financing the contracts, the plaintiff had obtained financial assistance by way of factoring from Affin Bank Bhd as well as Standard Chartered Bank Bhd. Affin Bank Bhd financed contract No K1530949/07, D while Standard Chartered Bank financed contract No K1260066/07.

[7] Vide a factoring agreement and deed of assignment both dated 13 December 2006 between the plaintiff and Affin Bank Bhd the plaintiff had E assigned all of its rights from the proceeds of contract K1530949/07 to Affin Bank Bhd. The defendant was informed of such assignment and that all payment of invoices in respect of the contract be made to the plaintiff's Affin Bank account No 100680162501 ('the designated account') at No 10 Jalan Todak 1, Pusat Bandar Seberang Jaya, 13700 Prai, Pulau Pinang.

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[8] To finance the works under the contract K1260066/07, the first defendant had obtained financial assistance of RM4,200,000 from Standard Chartered Bank. By a letter dated 21 December 2007, the plaintiff also gave notice to the defendant that the plaintiff had assigned all of its rights from the G proceeds of the contract K1260066/07 to Standard Chartered Bank and all payment of invoices under contract K1260066/07 was to be made to the plaintiff's Standard Chartered Bank account No 312100915114 at Level 15, Menara Standard Chartered, 30 Jalan Sultan Ismail, 50250 Kuala Lumpur.

H **[9]** The plaintiff had performed the works under the two contracts for the supply, delivery and provision of engineering services for battery system for the defendant. Invoices for payment were issued in respect of both contracts.

[10] In 2010 the plaintiff was informed by Affin Bank that there was a I shortfall of payment received by Affin Bank in respect to contract K1530949/07. The shortfall was in the amount of RM3,586,000.

[11] On 27 November 2011 the plaintiff and the defendant entered into a settlement agreement in respect of contract No K1530949/07.

[12] In 2011 the plaintiff was wound up by Lembaga Hasil Dalam Negeri (LHDN) for default in the payment of income tax.

[13] After the plaintiff obtained sanction from the Insolvency Department, the plaintiff initiated this claim against the defendant. However, after a discovery application made against the defendant in January 2016, it appeared that a payment of RM6,924,043.93 was paid into an account that was different from the designated account.

PROCEEDINGS IN THE HIGH COURT ISSUES

[14] The issues raised by the plaintiff's claim may be summarised as follows:

(a) whether the defendant had paid all the payment invoices in respect of contract K1530949/07 into non designated accounts or accounts not connected to the plaintiff?

(b) whether the defendant was liable to make payments to the plaintiff for the amount not credited into the designated account?

(c) whether the plaintiff is estopped from claiming the amount not credited into the designated account because of the settlement agreement of 27 November 2007? and

(d) whether the plaintiff's claim against the defendant is barred by limitation?

THE PLAINTIFF'S SUBMISSIONS

[15] The plaintiff's submissions may be summarised as follows:

(a) by letters to the defendant dated 6 August 2007 and 31 January 2008, the plaintiff had given instructions to the defendant that payment in respect of the invoices under contract K1530949/07 was to be made to the designated account at Affin Bank and in respect of contract K1260066/07, the designated account at Standard Chartered Bank. However, the defendant had failed to pay the monies into the designated accounts, but had credited the amount into other accounts not belonging to the plaintiff;

(b) the dispute on the payment was in respect of invoices for contract K1530949/07. The plaintiff only discovered that the defendant had not credited payment into the designated account when the plaintiff was informed by Affin Bank of the same vide a letter dated 27 June 2010. The plaintiff filed this action against the defendant in 2015. Thus the plaintiff's claim against the defendant is not caught by limitation; and

(c) the settlement agreement dated 27 December 2011 between the plaintiff and the defendant was only in respect of the extension of warranty of the battery supplied by the plaintiff to the defendant and not in respect of payment under the contracts. Thus the plaintiff is not estopped from bringing this claim against the defendant.

THE DEFENDANT'S SUBMISSIONS

[16] The defendant's submissions may be summarised as follows:

(a) vide letters to the defendant dated 21 January 2008, 28 February 2008 and 4 March 2008, Affin Bank had given varying instructions to the plaintiff in respect of payments on invoices issued by the plaintiff to the defendant. The plaintiff was obliged to endorse on these invoices, specific instructions of payment, which instructions would then be complied with by the defendant. However, a number of the payment invoices that were issued to the defendant did not contain specific instructions to credit payment into the designated account. In the absence of such instructions, the standard operating procedure of the defendant was to credit payment into the first bank account of the plaintiff as appear in the defendant's computer system, which accounts were arranged alphabetically;

(b) the defendant had made payment on all the invoices issued by the plaintiff to the defendant in respect of the contract K1530949/07. A sum of RM6,749,864.52, although not paid to the designated account at Affin Bank was nevertheless paid into other accounts of the plaintiff;

(c) the plaintiff had committed breaches of contract which had been resolved by a settlement agreement between the plaintiff and the defendant. The settlement agreement dated 27 December 2011 was in respect of the plaintiff's breach of the supply of goods pursuant to contract K1530949/07. However, according to cl 2.1 of the settlement agreement, the parties agree that any and all claims arising from contract K1530949/07 have been resolved. Thus the plaintiff is estopped from bringing any claim for any outstanding payment (which is denied) in respect of contract K1530949/07; and

(d) the plaintiff's claim is barred by limitation.

THE DECISION OF THE HIGH COURT

[17] In arriving at his decision, the learned trial judge had focused on three issues viz limitation, estoppel and the plaintiff's burden of proof; as stated in para 23 of his grounds of judgment as follows:

[23] Berdasarkan keterangan dan hujah-hujah yang dikemukakan saya dapati

terdapat beberapa isu yang telah ditimbulkan terhadap tuntutan plaintif. Isu-isu tersebut adalah halangan masa, estopel dan pembuktian kes oleh plaintif.

[18] The learned trial judge allowed the plaintiff's claim for the amount of RM5,533,072.25. The amount is derived from the original amount claimed of RM6,749,864.52, with a deduction of RM1,516,792.27 which it was not disputed, had been paid by the defendant into the plaintiff's account by cheques. It was a finding of the learned trial judge that on the evidence adduced the above stated amount was paid into accounts different from the plaintiff's designated accounts at Affin Bank. At para [24] of the grounds of judgment, it was stated:

... Saya dapati berdasarkan keterangan dan penghujahan yang dikemukakan oleh peguam-peguam, tuntutan utama Plaintif untuk jumlah RM6,749,864.52 adalah bagi bayaran-bayaran yang sebenarnya telah dibuat oleh Defendan ke dalam akaun selain dari akaun Plaintif bernombor tersebut.

[19] In the learned trial judge's grounds of judgment (at paras [15] and [24]), the learned trial judge had attributed the defendant's default of payment on the payment invoices into the designated account, on the mistake of the defendant;

[15] Berdasarkan serahan hak tersebut dan berdasarkan surat dari plaintif kepada defendan bertarikh 6 Ogos 2007, semua invois yang dikeluarkan oleh plaintif kepada defendan di bawah kontrak K1530949/07 akan dibayar ke akaun 100680162501 di Affin Bank Berhad, No 10, Jalan Todak 1, Pusat Bandar Seberang Jaya, 13700 Prai, Pulau Pinang; kerana semua hutang yang berbangkit dari invois di bawah akaun tersebut telah dijual dan dipindahmilik kepada Affin Bank ...

[24] Saya dapati tuntutan plaintif bukan berasaskan kegagalan defendan membayar invois tersebut. Tuntutan plaintif adalah berasaskan kesilapan defendan pertama membayar invois ke akaun yang disetujui iaitu akaun plaintif bernombor 100680162501 di Affin Bank, Pusat Bandar Seberang Jaya, 13700 Prai, Pulau Pinang.

[20] The learned trial judge also made a finding that the plaintiff had proven that the payment invoices contained the instruction of the designated account to be credited while the defendant had failed to prove that no such instruction was noted on the payment invoices. In his grounds of judgment at para [30] the following was stated:

[30] Dengan mempertimbangkan keterangan-keterangan tersebut saya dapati plaintif telah membuktikan invois-invois yang dihantar tersebut telah mencatat nombor akaun pembayaran di Affin Bank, Pusat Bandar Seberang Jaya. Defendan pula gagal membuktikan penegasan mereka bahawa tidak ada catatan sedemikian. Berdasarkan fakta tersebut dan di atas persetujuan defendan sendiri terhadap penyerahan hak dan aturan pembayaran yang dibuat di antara plaintif dan Affin Bank, Defendan terikat membuat bayaran tersebut ke akaun Affin Bank yang

dimaklumkan. Berdasarkan keterangan yang dikemukakan bayaran-bayaran tersebut telah dibuat selain dari akaun dicatat. Saya memutuskan defendan bertanggungan membuat bayaran kepada akaun yang telah disetujui sahaja iaitu akaun bernombor 100680162501 di Affin Bank, Pusat Bandar Seberang Jaya, Prai, Pulang Pinang.

[21] The learned trial judge expressed the view that the defendant had the burden to prove that the defendant was aware that the defendant was obliged to credit payment only into the designated account and that the defendant had made payments to other accounts belonging to the plaintiff. This, according to the learned trial judge was in accordance with s 101 of the Evidence Act 1950. In paras [25]–[26] of the grounds of judgment, it was stated as follows:

[25] Plaintiff yang menegaskan bahawa bayaran tersebut perlu dibuat ke akaun tersebut sahaja dan defendan mengetahui serta menyetujui penyerahan hak tersebut mempunyai beban untuk membuktikan bahawa defendan mengetahui bayaran hanya boleh dibuat ke akaun tersebut sahaja dan tidak kepada akaun lain. Saya dapati beban ini telah dipenuhi oleh plaintif melalui keterangan yang dikemukakan. Keterangan saksi-saksi plaintif menunjukkan terdapat jumlah bayaran yang telah dibuat oleh defendan ke akaun selain dari akaun 100680162501 tersebut.

[26] Setiap pihak yang membuat penegasan perlu membuktikan penegasan mereka berdasarkan s 101 Akta Keterangan 1950. Di dalam kes ini Plaintif dan Defendan telah membuat penegasan masing-masing dan mereka mempunyai beban membuktikan penegasan tersebut. Saya juga bersetuju dengan penghujahan peguam Plaintif beban membuktikan bukanlah keseluruhannya terletak ke atas Plaintif di dalam kes ini. Beban membuktikan juga akan bergantung kepada keadaan sesuatu kes tersebut (lihat kes *Nanyang Development (1966) v How Swee Poh* [1970] 1 MLJ 145).

[22] In defence, the defendant had asserted that while the amount was not credited into the stipulated account in Affin Bank as agreed to, and payments had been made into other accounts, these were nevertheless accounts belonging to the plaintiff. Thus, the plaintiff had received payments on the invoices. The plaintiff had then attempted to admit documentary evidence ('C3') in support of their assertion. However, the learned trial judge ruled the said documents to be inadmissible by virtue of the fact that the documents were computer generated documents and was therefore subject to the requirement of a certificate pursuant to s 90A of the Evidence Act 1950 or the document must be tendered by a person who has custody and control of the computer.

[23] In the learned trial judge's grounds of judgment at paras [31]–[32], the following was stated:

[31] Defendan menegaskan pembayaran-pembayaran tersebut telah dibuat ke akaun-akaun kepunyaan plaintif walaupun akaun itu bukan akaun di Affin Bank

yang dipersetujui. Defendan mempunyai beban untuk membuktikan penegasan ini. Saya dapati defendan tidak dapat membuktikan penegasan ini. Defendan cuba bergantung kepada dokumen-dokumen yang terkandung di dalam ikatan dokumen C3, ikatan dokumen yang tidak dipersetujui. Plaintif telah membantah pengemukaan dokumen ini. Saya dapati dokumen yang terkandung di dalam C3 yang cuba dikemukakan oleh SD3 tidak boleh diterima masuk. Adalah jelas dokumen ini adalah cetakan komputer. Pengemukaan keterangan tersebut tertakluk kepada s 90A Akta Keterangan 1950.

[32] Secara amnya dokumen cetakan komputer boleh diterima masuk dengan memanggil orang yang mempunyai kawalan dan jagaan ke atas komputer yang darinya dokumen tersebut dicetak atau dengan mengemukakan sijil yang dikeluarkan di bawah s 90A Akta Keterangan 1950.

[24] In the absence of a certificate pursuant to s 90A of the Evidence Act 1950 and evidence to prove that SD3 was in charge of the computer, the learned trial judge made the finding that C3 was inadmissible and thus the defendant was unable to prove that payment of the outstanding amount under the payment invoices had indeed been paid to the plaintiff.

[25] On the issue of limitation, the learned trial judge made a further finding that the plaintiff's claim was not barred by limitation as the contracts between the plaintiff and the defendant came to an end in 2010 and the plaintiff had filed his claim in 2015, which was within the six year limitation period. In addition, the plaintiff had only recently discovered the defendant's mistake in not crediting the payment invoices into the designated account.

[26] In addition, it was also the finding of the learned trial judge that the settlement agreement between the plaintiff and the defendant did not operate as an estoppel against the plaintiff's claim as the settlement agreement was to resolve the issue of the extension of the warranty of the battery supplied by the plaintiff and not the failure of the defendant to pay the payment invoices pursuant to contract K1530949/07.

GROUNDS OF APPEAL

[27] The primary grounds raised by the defendant in this appeal can be summarised as follows.

Burden of proof

[28] The learned trial judge had made an error in law in imposing on the defendant the burden to prove its defence, rather than imposing the burden on the plaintiff to prove its claim. There was also judicial misappreciation when the learned trial judge failed to take into account the contents of a letter dated 6 August 2007 which stipulate requirements to be complied by the plaintiff

before payment is made by the defendant. Paragraph 6 of the abovementioned letter states that in circumstances where payments were made by the defendant to other accounts belonging to the plaintiff, the plaintiff must take steps to regularise its own accounts with the respective banks. There is evidence that some of the invoices of the plaintiff did not comply with the abovementioned requirements. Thus there was an erroneous finding that the plaintiff had discharged his burden of proof.

Admissible documents

[29] The learned trial judge had erred in law and fact in refusing to mark the documents comprised in Bundle C3 as exhibits. The learned trial judge had failed to appreciate that a certificate issued under s 90A of the Evidence Act 1950 is not the only manner in which electronically generated documents can be admitted. At the trial, the maker of the documents was present in court to tender the documents. The learned trial judge had erred in precluding counsel for the plaintiff from asking DW3 whether DW3 had full control of the computers from which the documents were generated and whether the same computers were in good working order.

Unjust enrichment

[30] The learned trial judge failed to appreciate that because payments due under the contracts had been paid to the plaintiff, albeit in other than the designated accounts, allowing the plaintiff's claim would tantamount to unjust enrichment as the plaintiff would be paid a second time on the same invoices that had already been paid by the defendant.

Mistake

[31] The learned trial judge had erred in law and fact in holding that the plaintiff's claim was premised upon the recovery of monies paid by the mistake of the defendant, which was not the plaintiff's pleaded cause of action against the defendant. The cause of action pleaded by the plaintiff was for the recovery of monies due in respect of invoices issued for works done pursuant to the contracts.

Estoppel

[32] The learned trial judge had erred in holding that the plaintiff is not estopped from commencing this action in spite of the clear terms of the settlement agreement dated 27 November 2011 between the plaintiff and the defendant.

Damages

[33] The learned trial judge had erred in allowing the plaintiff's claim for damages for the sum of RM84,985.75. The amount represents the interest imposed by Affin Bank for the interest charged on the plaintiff in respect of the judgment in default that was obtained by Affin Bank Bhd against the plaintiff. The sum is not within the contemplation of the defendant. Neither was the defendant a party to the proceedings brought by Affin Bank against the plaintiff.

OUR DECISION

[34] After careful consideration of the records of appeal as well learned counsels' written and oral submissions, we are of the view that there were appealable errors in the learned trial judge's findings of law and fact that warrant appellate intervention. In consequence thereof, we allow this appeal with costs and set aside the decision of the learned trial judge. We give our reasons below.

BURDEN OF PROOF

[35] It is a fundamental principle of law that in a civil case, the legal burden of proof lies on the party who brings the claim. The evidential burden may shift to the defendant once the plaintiff has established a prima facie case. This principle was stated by the Court of Appeal in the recent case of *Gerard Jude Timothy Pereira v Kasi a/l KL Palaniappan* [2017] 6 MLJ 54 at para [50] as follows:

> [50] As rightly pointed out by the learned trial judge himself, in a civil case the plaintiff bears both the legal and evidential burden of proof (see ss 101 and 103 Evidence Act 1950). It is also trite law that legal burden is imposed by law and remains with the plaintiff throughout the trial and never shifts to the defendant. On the other hand, evidential burden moves to and fro between the plaintiff and the defendant depending on the state of the evidence introduced at any one stage of the trial, and unless and until the plaintiff discharges his evidential burden by establishing a prima facie case, there is no burden on the defendant to prove his defence, no matter how weak his defence might be.

[36] The learned trial judge had misdirected himself in respect of the legal and evidential burden of proof. Even though the plaintiff had not discharged the evidential burden to establish a prima facie case that payments on the contracts with the defendant was outstanding, the learned trial judge had nevertheless shifted the evidential burden on the defendant to prove their defence that although the payments were not credited into the designated accounts, payments were nevertheless credited into other accounts of the plaintiff.

A ADMISSIBILITY OF C3

[37] The abovementioned errors of the learned trial judge were further compounded when the learned trial judge refused to admit the evidence sought to be tendered by the defendant that the payments were in fact credited into other accounts belonging to the plaintiff. The documentary evidence of the defendant's defence were computer generated printouts with details of the payments and accounts into which payments under the contracts had been credited ('C3'). The learned trial judge however made a ruling that the said documents were inadmissible as a certificate under s 90A of the Evidence Act 1950, was required to verify that such documents were generated in the ordinary course of business by a computer that was in working order.

[38] In ruling C3 as inadmissible, the learned trial judge had failed to appreciate that the required verification could also be obtained from the testimony of SD3 who had the control and management of the computers which generated the said documents.

Section 90A of the Evidence Act, 1950 is reproduced below:

> 90A Admissibility of documents produced by computers, and of statements contained therein
>
> (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.
>
> (2) For the purposes of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.

[39] It was unfortunate that the learned trial judge took a very narrow approach to s 90A above, by stating in his ruling that the documents were admissible only by a certificate, even when the person with the authority to issue the certificate was present physically to make the verification in person. There are authorities that lay down the principle that a certificate under s 90A is not the only method in which an electronically generated document can be introduced as evidence. In the case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613, the Federal Court at para [31] had stated as follows:

> I am of the view that a certificate under s 90A(2) of the Act is not the only method to prove that a document was produced by a computer 'in the course of its ordinary

use'. On this point, I would first like to cite the case of *Gnanasegaran a/l Parajasingam v Public Prosecutor* [1997] 3 MLJ 1 where Shaik Daud JCA said at p 11:

> On reading through s 90A of the Act, we are unable to agree with the construction placed by the learned counsel. First and foremost, s 90A which has seven subsections should not be read disjointedly. They should be read together as they form one whole provision for the admissibility of documents produced by computers. As stated, earlier s 90A was added to the Act in 1993 in order to provide for the admission of computer produced documents and statements as in this case. On our reading of this section, we find that under sub-s(1), the law allows the production of such computer generated documents or statements if there is evidence, firstly, that they were produced by a computer. Secondly, it is necessary also to prove that the computer is in the course of its ordinary use. In our view there are two ways of proving this. One way is that it 'may' be proved by the production of the certificate as required by sub-s (2). Thus, sub-s (2) is permissive and not mandatory. This can also be seen in sub-s (4) which begins with the words 'Where a certificate is given under subsection (2).
>
> These words show that a certificate is not required to be produced in every case. It is our view that once the prosecution adduces evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s (2) as sub-s (6) provides that a document shall be deemed to be produced by a computer in the course of its ordinary use.

[40] From the notes of proceedings, learned counsel for the defendant had commenced questions for DW3 to verify that he had control over the computer system in order to fulfil the requirements of s 90A of the Evidence Act 1950, but was stopped by the learned trial judge who insisted on the production of a certificate nevertheless. The relevant notes of proceedings (date: 29 December 2016 at p 97–100) are reproduced below:

> IDH: Yes, My Lord, Encik Rahman, can I refer you to pages 81 to 85, this is question 12 and answer 12 of your witness statement, pages 81–85 of the Bundle C. Can I have the originals? Can you confirm that these documents are printed from a system which is under your control?
>
> DW3: Yes, this is actually a system printed from the-our system, SAP systems.
>
> YA: Any certificate?
>
> IDH: My Lord, we are not aware that the authenticity of these documents are objected to at the point when it was introduced, my Lord.
>
> YA: Have to be aware of that?
>
> IDH: But the certificate is not necessary if the maker is called, under the Evidence Act.
>
> YA: What is the evidence the maker is called. Where is the evidence that shows he is the maker?

A IDH: We have the original print outs with us, My Lord. He is in control of the machine and he has ...

YA: There must be an evidence, you cannot tell me from the bank, or from the ... from the bar table, you are not the witness, Don't ... everything, don't presume. Don't assume.

B

[41] The learned trial judge had therefore made a grave error of law in his ruling that C3 was inadmissible. The C3 documents were material as they represent documentary evidence that all the payment invoices had been credited into the defendant's accounts. In wrongfully refusing to admit the documents, the learned trial judge had made an error in law which error to our minds contributed in a substantial degree to an erroneous finding of fact that the plaintiff had succeeded in proving his claim.

D PAYMENT INSTRUCTIONS

[42] In addition, the learned trial judge had erred in his finding that the defendant was the party who was entirely to be blamed for having credited the payment on the invoices into non-designated accounts contrary to the express instructions stipulated in a letter ('the letter') dated 6 August 2007 issued by the plaintiff to the defendant. While the learned trial judge had alluded to the letter, he had failed to take cognizance of the express terms of the letter which stipulates terms agreed to by both parties in respect of the payment on the invoices of contract K1530949/07.

F

[43] The letter states that vide a deed of assignment/factoring agreement entered into between the plaintiff and Affin Bank Bhd, the plaintiff had assigned all of its rights from the proceeds of contract K1530949/07 to Affin Bank Bhd. The defendant was instructed to credit all payments under the said contract to a designated account (account No 100680162501) at Affin Bank Bhd at No 10, Jalan Todak 1, Pusat Bandar Seberang Jaya, 13700 Prai, Pulau Pinang.

H **[44]** Clause 6 of the letter states that the plaintiff will not hold the defendant responsible in circumstances where payments have mistakenly been made by the defendant to the plaintiff. In such circumstances, the plaintiff would take steps to regularise its own accounts with its bank. Clause 6 reads as follows:

I 6. Persetujuan TM di atas permohonan kami tidak akan membuat TM bertanggungjawab sekiranya pembayaran tersilap hantar atau dibuat syarikat kami. Sekiranya pembayaran tersilap hantar atau dibuat kepada syarikat kami, pembayaran itu akan kami uruskan dengan Pihak Bank.

[45] The plaintiff's own witness PW1, in cross-examination had agreed that

it was the responsibility of the plaintiff to regularise its own accounts with its own bank, Affin Bank (at pp 16–17 of the notes of proceedings):

> IDH: (*Defence Counsel*) Setuju tak dengan saya kalau berdasarkan perenggan 6 surat ni, sekiranya KLK menerima wang yang sepatutnya diberi kepada Affin Bank dalam akaun yang lain tetapi akaun di bawah namanya, KLK bersetuju akan membuat pengurusan secara terus dengan Bank untuk membuat pembayaran kepada Affin Bank .
>
> PW1: Setuju.

[46] in addition, the learned trial judge had made a finding that all the plaintiff's payment invoices that were issued to the defendant contained the instruction to credit payments under the contract to a designated account. In para 30 of the grounds of judgment it was stated as follows:

> Dengan mempertimbangkan keterangan-keterangan tersebut saya dapati Plaintif telah membuktikan invois- invois yang dihantar tersebut telah mencatat nombor akaun pembayaran di Affin Bank, Pusat Bandar Seberang Jaya. Defendan pula gagal membuktikan penegasan mereka bahawa tidak ada catatan sedemikian.

[47] However, the learned trial judge had failed to consider the evidence of the plaintiff's own witness PW1 that there was a lack of conclusive evidence that all the invoices contained the specific instructions for payment into the designated account. The testimony of PW1 on 26 October 2016 at pp 29–30 of the notes of evidence is reproduced below:

> IDH: Ini berkenaan dengan soalan dan jawapan 18. Ini berkenaan dengan inbois-inbois yang Plaintif katakan telah dihantar kepada Defendan seperti Encik Ibrahim katakan tadi. Encik Ibrahim bersetuju bahawa tiada inbois-inbois ini tidak terdapat di Ikatan Dokumen yang berada di Mahkamah pada hari ini, betul?
>
> PW1: Betul.
>
> IDH: Jadi sama ada inbois-inbois ini telah dicop ke tidak dengan arahan pembayaran, Encik Ibrahim tak pasti. Setiap satu inbois tu dicop ke tidak Encik Ibrahim tak pasti, setuju atau tak?
>
> PW1: Betul

[48] From the above, it appears that the learned trial judge had made findings of fact that were inconsistent with the evidence adduced at trial. On a balance of probabilities, in the light of the evidence adduced, it is our considered opinion that the plaintiff had failed to prove his claim to recover the monies alleged to be outstanding from the defendant for payment invoices in respect of contract K1530949/07.

A MISTAKE

[49] We are also of the view that the learned trial judge had also erred in his finding that the plaintiff's claim is not for recovery of outstanding amounts due under the payment invoices in respect of a contract, but a recovery of monies B that had been paid by mistake when payments due to the plaintiff were credited to accounts other than the designated accounts. The learned trial judge however made no reference to s 73 of the Contracts Act 1950 which is a specific provision for the recovery of money paid or anything delivered by mistake. Section 73 of the Contracts Act provides as follows: C

> 73 Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.
>
> A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

D

[50] The Federal Court in the case of *Malayan Banking Bhd v Ching Suit Fee* [2012] 2 MLJ 289, had referred to the scope and applicability of s 73 of the Contracts Act 1950 in the following terms:

E

> [16] Section 73 of the Contracts Act 1950 applies both to mistake of fact as well as mistake of law. The Privy Council in the case of *Shiba Prasad Singh v Chandra Nandhi* (1949) 76 IA 244 when construing payment by mistake under s 72 of the Indian Contracts Act which is in pari material with our s 73 stated that it must refer to a payment which was not due and which could not have been enforced. The mistake is in thinking that the money paid was due when in fact it was not due.

F

[51] From the authorities abovementioned, the recovery of monies paid under a mistake must be in reference to a payment which was not due and which could not have been enforced. The facts in the instant case is clearly G distinguishable in that the payment on the invoices was due. The mistake was in crediting the amount to other than the agreed designated account. Thus, the learned trial judge was in plain error in his finding that the mistake in crediting into a non-designated account was a mistake in law.

H **[52]** In any event, in making the abovementioned ruling, the learned trial judge was plainly in error in departing from the plaintiff's pleaded case. It is trite that parties are bound by their pleadings and a court is not at liberty to introduce a different cause of action from that pleaded by parties.

I **[53]** In conclusion, we are of the considered view that there are patent errors of law and finding of facts by the learned trial judge to warrant appellate intervention. It is clear from the evidence adduced that the plaintiff has not succeeded to prove its claim on the balance of probabilities. No unpaid invoices of the defendant were adduced as evidence before the court. The learned trial

judge was plainly wrong to reverse the burden of proof on the defendant to prove its defence. When the documents sought to be tendered by the defendant in its defence was wrongly held to be inadmissible by the learned trial judge, the trial judge clearly erred in his determination that the plaintiff had somehow succeeded in proving its claim. The documents which play a determining role should have been admitted and their denial is a fatal flaw. The payments prima facie appear to have been credited into other accounts belonging to the plaintiff. Thus, we agree with the submission of learned counsel for the defendant that to allow the plaintiff's claim for the same invoices that had already been paid by the defendant into other accounts of the plaintiff would result in unjust enrichment to the plaintiff.

[54] For all the reasons stated above, we allow this appeal with costs of RM20,000 for this appeal subject to allocatur fees. The decision of the High Court is set aside and deposit to be refunded.

Appeal allowed; High Court's decision set aside.

Reported by Ashok Kumar